

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WaterLegacy
1961 Selby Ave.
St. Paul, MN 55104

Plaintiff,

U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW,
Washington, DC 20004

Defendant.

CIVIL ACTION NO. 19-2655

COMPLAINT

1. Plaintiff WaterLegacy (“Plaintiff”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended, to compel the U.S. Environmental Protection Agency, (“EPA” or “Defendant”) to disclose records wrongfully withheld in failing to respond within the statutory deadline to Plaintiff’s FOIA request.

PARTIES

2. Plaintiff, WaterLegacy, is a non-profit organization incorporated under the laws of Minnesota.

3. WaterLegacy’s mission is to counter the threat from sulfide mining in Northern Minnesota. It collaborates with partners across the region to protect against the concern that sulfide mining would destroy wetlands, wildlife, habitats and wild rice, contaminate water with toxic metals, increase mercury levels in fish, and impair tribal rights. Since 2009, it has grown to over 9,000 supporters and has

facilitated the filing of over 45,000 citizen comments and other actions to protect the waters of Minnesota.

4. As part of its mission, WaterLegacy is an active participant in environmental review and permitting for proposed mining sites overseen by Defendant.

5. Defendant, EPA, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1). EPA is a federal agency that, *inter alia*, is responsible for review and oversight of state implementation of the National Pollutant Discharge Elimination System and State Disposal System (NPDES/SDS) under § 402 of the Clean Water Act. 33 U.S.C. § 1342.

6. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of FOIA. Here, Defendant is denying Plaintiff access to its records in contravention of federal law.

STATEMENT OF FACTS

7. For the last several years, regulatory review has been ongoing for PolyMet Mining's planned copper-nickel mine in northern Minnesota called the "NorthMet" mine. The mine site and processing plant are planned to occupy approximately 19,000 acres (30 mi²) in the St. Louis River basin, 175 river miles upstream from Lake Superior.

8. NorthMet would create a permanent source of effluent contamination in the St. Louis River and Lake Superior and is anticipated to destroy approximately 900 acres of wetlands.

9. For almost a decade, EPA has conducted reviews of certain regulatory materials prepared by PolyMet and its agents, and by the Minnesota Department of Natural Resources (MDNR), the Minnesota Pollution Control Agency (MPCA), the U.S. Forest Service, and the U.S. Army Corps of Engineers. Throughout this period, and at the request of MDNR and other co-lead agencies in conducting environmental reviews of NorthMet, EPA, as a cooperating agency, has provided written comments and recommendations to assist co-lead agencies in preparing environmental review materials. EPA stated in a letter confirming the request for EPA's written assistance dated August 7, 2013, that it "expects downstream water quality standards to be considered and protected throughout the NPDES permitting process."

10. A draft NPDES permit for the PolyMet mining project was released in January 2018, with a comment period ending on March 16, 2018, but EPA did not deliver official comments on the NPDES permit in this stage or later in the pre-approval process for the final NPDES permit, despite having substantial concerns over the permit's lack of water quality protections.

11. Those concerns were reduced to a writing which was read aloud by EPA professional staff to MPCA employees over the phone on or about April 5, 2018. The written comments which were read to MPCA were obtained via FOIA after litigation between the same parties to this case. *See WaterLegacy v. EPA*, 1:19-cv-00412 (D.D.C. 2019).

12. On June 12, 2019, the Office of Inspector General of the EPA announced by letter that it would be conducting an audit of Region 5's review of the PolyMet

Mining Company's NPDES Permit to determine whether the EPA followed appropriate Clean Water Act and NPDES regulations to review that permit.

13. On June 18, 2019, the American Federation of Government Employees Local 704, which represents the EPA's Region 5 employees in Minnesota, sent news organizations a copy of a portion of an email sent by then-MPCA Assistant Commissioner Shannon Lotthammer to EPA Region Chief of Staff Kurt Thiede on May 13, 2018. In the email, Lotthammer asked Thiede and the EPA to wait to send comments on the draft NPDES permit for the PolyMet NorthMet mine until after the public comment period ended. The document provided by the AFGE union indicated that the email had been forwarded and contained an attachment. The AFGE press release is attached as Exhibit A.

14. On June 25, 2019, the Minnesota Court of Appeals issued an order *In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System / State Disposal System Permit No. MN0071013 for the Proposed Northmet Project St. Louis County Hoyt Lakes and Babbitt Minnesota*, A19-0112, A19-0118, A19-0124 (Minn. Ct. App.) ("NorthMet NPDES Appeals") transferring the NorthMet NPDES Appeals to Ramsey County District Court for a hearing to determine alleged procedural irregularities on "substantial evidence of procedural irregularities" including "undisputed evidence that . . . (2) the EPA prepared written comments on the draft NorthMet permit; (3) those written comments were never submitted to the MPCA and are not part of the administrative record"). The June 25, 2019 Order is provided in Exhibit B.

15. On August 6, 2019, the Minnesota Court of Appeals issued a second order in the NorthMet NPDES Appeals granting a stay of the NorthMet NPDES permit, stating, “A substantial issue has been raised as to the regularity of the MPCA's proceedings in granting the permit, and this court has ordered the exceptional remedy of a transfer to district court to hear and determine those irregularities.” The August 6, 2019 Order is provided in Exhibit B.

Plaintiff's FOIA Request

16. On June 19, 2019, Plaintiff submitted a FOIA Request to EPA Region 5 through FOIAOnline.gov. That request sought:

WaterLegacy requests production of a single easily-identified EPA Region 5 document. This document is an email from Minnesota Pollution Control Agency Assistant Commissioner Shannon Lotthammer to EPA Region 5 Chief of Staff Kurt Thiede dated on or about March 13, 2018, which email requested that EPA Region 5 “not send a written comment letter during the public comment period” for the PolyMet NorthMet NPDES permit.

17. Plaintiff's June 19, 2019 FOIA Request to EPA Region 5 through FOIAOnline.gov also uploaded the AFGE union press release, which is attached as Exhibit C.

18. Plaintiff's FOIA Request was acknowledged on June 19, 2019 and assigned tracking number EPA-R5-2019-006657. Later the same day, Plaintiff received a system-generated email stating that the FOIA Request's tracking number had been changed to EPA-HQ-2019-006657. The estimated date of completion was listed as July 19, 2019.

19. On August 2, 2019, Plaintiff inquired with the Region 5 FOIA Office about its FOIA Request, stating that it was due on July 19, 2019 and asking when

Plaintiff could expect to receive production of the requested document. An EPA Region 5 FOIA Officer replied later that day that he had “asked our Office of the Regional Administrator to contact you regarding the status of EPA-R5-2019-006657.” Plaintiff has not received any substantive communications about its FOIA Request from Defendant and has not received any communications about its FOIA Request from Defendant since August 2, 2019.

CAUSE OF ACTION

20. Plaintiff incorporates and restates the allegations of the preceding paragraphs as though fully set forth herein.

21. The FOIA requires federal agencies to respond to public requests for records, including files maintained electronically, to increase public understanding of the workings of government and to provide access to government information. FOIA reflects a “profound national commitment to ensuring an open Government” and agencies must “adopt a presumption in favor of disclosure.” Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).

22. The FOIA requires agencies to make a determination on a FOIA appeal within twenty working days after its receipt. 5 U.S.C. § 552(a)(6)(A)(ii). Agencies may extend this twenty-day time period only upon written notice of “unusual circumstances,” and then for no longer than ten days. 5 U.S.C. § 552(a)(6)(B).

23. To date, Defendant has not indicated that any “unusual circumstances” existed regarding this FOIA request. This request is for a single document, a portion of which has been released already, making it simple to locate.

24. To date, Defendant has failed to make a final determination on, or produce any documents in response to, Plaintiff’s June 19, 2019 FOIA request.

25. Defendant’s twenty-working day time period to respond to the request expired on July 19, 2019. See FOIAONLINE, EPA-R5-2019-006657 REQUEST DETAILS (last visited August 30, 2019),

<https://www.foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-R5-2019-006657&type=request>.¹

26. Defendant’s conduct amounts to a denial of Plaintiff’s FOIA request.

27. Defendant is frustrating Plaintiff’s efforts to inform the public about EPA’s consideration of permitting and regulatory matters and how Region 5 EPA has engaged with the MPCA regarding a NPDES permit of great public interest.

28. Defendant’s failure to respond to this FOIA request is also frustrating litigation concerning the NorthMet NPDES permit by withholding documents which are necessary to determine alleged procedural irregularities and complete the full administrative record in that action. The conduct of the MPCA is at issue in the

¹ While FOIAOnline indicated that the index number for Plaintiff’s request had been updated from EPA-R5-2019-006657 to EPA-HQ-2019-006657, there is not currently a page on FOIAOnline for the “new” index number and a search for it yields no results.

litigation, and the requested email would provide direct evidence of communications with EPA and, potentially, with others to whom the email was forwarded.

29. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Plaintiff constructively exhausted its administrative remedies when EPA failed to produce a determination on July 19, 2019, which was 20 working days after Defendant's request was finalized within FOIAOnline, and Plaintiff now seeks an order from this Court requiring Defendant to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

JURISDICTION AND VENUE

30. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.

31. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

32. This Court is a proper venue because Defendant is a government agency that resides in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1)(A) (where defendant is the government or a government agency, a civil action may be brought in the district where the defendant resides). Venue is also proper under 5 U.S.C. § 552(a)(4)(B) (providing for venue in the District of Columbia for cases brought under FOIA).

33. This Court has the authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an order declaring that Defendant wrongfully withheld requested agency records;
- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld records;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA and every order of this Court;
- iv. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on September 4, 2019,

/s/ Paula Dinerstein
Paula Dinerstein, DC Bar # 333971
Public Employees for Environmental Responsibility
962 Wayne Ave, Suite 610
Silver Spring, MD 20910
(202) 265-7337
pdinerstein@peer.org

Counsel for Plaintiff